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IN THE

Supreme Court of the United States

October Term, 1975.

No. 75-1255.

JAMES E. DOUGLAS, JR.,

Appellant,

v.

SEACOAST PRODUCTS, INC., et al.,

Appellees.

Brief of Amicus Curiae in Support of Statement as to Jurisdiction to Review Judgment of the United States District Court for the Eastern District of Virginia.

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BRIEF AMICUS CURIAE IN SUPPORT OF STATEMENT AS TO JURISDICTION.

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INTERESTS OF AMICUS CURIAE.

The *amicus curiae* is the State of Delaware, located on the eastern seaboard of the United States, with 130 miles of coastline on the Delaware River, Delaware Bay, and the Atlantic Ocean. It has a substantial interest in the regulation of the fisheries within its jurisdiction.

The court below held invalid two of the basic provisions of the Virginia Code governing the fishing industries operating in that State. One of those statutes, § 28.1-81.1 of the Code of Virginia of 1950, as amended was held to be violative of the Supremacy Clause of the Constitution, Art. VI, ¶ 2, because of pre-emption of this state law by the Act of 20 May 1974, 78 Stat. 194, 16 U. S. C. § 1081.

The court's resolution of this issue represents a significant departure in the law concerning the roles of the States and the federal government in the regulation of state and coastal fisheries. This ruling is the basis of the interest of the *amicus curiae*.

THE QUESTIONS ARE SUBSTANTIAL.

16 U. S. C. § 1081, Prohibiting Foreign Vessels From Fishing in United States Territorial Waters Except Upon Concurrent Federal and State Authorizations Does Not Reserve to the Federal Government Exclusive and Preemptive Authority to Regulate Commercial Sea Fisheries Within the Three-Mile Territorial Limit.

The District Court below found that 16 U. S. C. § 1081, ". . . preempted Virginia's control of commercial sea fisheries and superseded the State's regulation of them." Nowhere does the Court attempt to limit the breadth of this holding to the particular aspect of commercial fishing addressed by this federal law. The effect of this holding is to nullify a wide range of Delaware statutes that regulate commercial fishing in various ways. These include, among other things, prohibitions of trawling, seasonal restrictions, regulations on fish size, types and placement of nets, landing restrictions, licensing requirements and lease agreements on subaqueous lands. It is clear that this holding goes far beyond the language and intent of 16 U. S. C. § 1081.

This broad interpretation of 16 U. S. C. § 1081 conflicts with basic principles of federal pre-emption and the application of these principles to the area of commercial sea fisheries. This Court has consistently held that the States may supplement federal regulations in a limited field where the state has a valid interest to protect and where there is no conflict between the state and federal laws. *Kelly v. Washington*, 302 U. S. 1 (1937), *Mintz v. Baldwin*, 289 U. S. 346 (1933), *Savage v. Jones*, 225 U. S. 501 (1912) and *Reid v. Colorado*, 187 U. S. 137 (1902).

These principles have been applied to State regulation of commercial sea fisheries with the three-mile limit, and this Court has held that the States may regulate in this area in the absence of any conflict with federal law. *Toomer v. Witsell,* 334 U. S. 385 (1948); *U. S. v. California,* 332 U. S. 19 (1947); *Skiriotes v. Florida,* 313 U. S. 69 (1941).

It is important for this Court to take jurisdiction of this case, since the decision below threatens state regulation of matters legitimately within its police power, threatens existing and contemplated state laws regarding commercial fishing and threatens the well-settled balance of state-federal control in this area.

16 U. S. C. § 1081, Prohibiting Foreign Vessels From Fishing in United States Territorial Waters Except Upon Concurrent Federal and State Authorization Does Not Evidence Any Intent to Preempt State Regulations of Commercial Fishing Even as Limited to the Control of Foreign Vessels Within the Three-Mile Territorial Limit, and in Fact Evidences an Intent to the Contrary.

In resolving the pre-emption issue, the District Court also held that ". . . prevention of incursions by foreigners is the responsibility exclusively of the Federal government." Even if the Court's decision can be restricted in this way to the limited applicability of 16 U. S. C. § 1081, it is still at odds with the language and intent of the statute and general rules of federal pre-emption.

16 U. S. C. § 1081 bans foreign vessels from fishing in United States territorial waters in the absence of specified authorization. Authorization can only be given, in the words of the statute, "upon concurrence of any State, Commonwealth, territory, or possession directly affected."

Thus, the language of the federal law indicates that it is not intended to pre-empt state control.

This interpretation is strongly supported by the legislative history of 16 U. S. C. § 1081. The Report of the House Committee on the Merchant Marine and Fisheries, H. R. Rep. No. 1356, 88th Cong., 2d Sess. (1963), discusses "the built-in veto power extended to the States directly affected by this bill," and indicates "that the powers of the States in dealing with trespassers of their territorial waters would not be preempted . . ." 2 U. S. Code Cong. & Adm. News 1964, p. 2183.

This Court has repeatedly held that federal enactments are preemptive only where there is express statutory intent to preempt the field in question or where the federal and state laws cannot operate consistently. *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U. S. 132, 142 (1963); *Savage v. Jones,* 225 U. S. 501, 535 (1912). Since the federal statute is intended to give the States a veto-power, Virginia Code § 28.1-81.1 cannot be deemed inconsistent with the federal law, and the absence of any express intent to preempt has been discussed.

To the extent that the District Court's decision holding § 28.1-81.1, Code of Virginia (1950), as amended, unconstitutional can be said to be based upon a violation of the Equal Protection Clause of the Fourteenth Amendment, it is worthy to note that the classification made is identical to that of the federal statute, and that non-citizens do in fact constitute the peculiar source of the evil at which both statutes are aimed. See, *Toomer v. Witsell,* 334 U. S. 385 (1948).

It is important for this Court to take jurisdiction of this case in order to correct the District Court's erroneous interpretation of 16 U. S. C. § 1081, and to preserve the existing relationship between the States and the Federal Government in the regulation of commercial sea fisheries.

CONCLUSION.

The Court below has erroneously interpreted 16 U. S. C. § 1081, and its decision threatens to invalidate a large number of laws of the State of Delaware that regulate commercial sea fisheries. In the process of erroneously invalidating § 28.1-81.1 of the Code of Virginia of 1950, as amended, as unconstitutional, the Court's holdings threaten to disrupt the balance of State and Federal authority in the regulation of commercial fishing within the territorial waters. For these reasons, this Court should note probable jurisdiction in this case to review the decision below.

Respectfully submitted,

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